U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: APR 1 0 2015

OFFICE: TEXAS SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before us on motion to reconsider. We will dismiss the motion.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. According to Part 6 of the Form I-140, Immigrant Petition for Alien Worker, the petitioner seeks employment as an elementary school teacher. At the time of filing, the petitioner was teaching at Florida. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. In our appellate decision, we upheld the director's determination.

On motion, the petitioner submits a brief and additional evidence. The petitioner asserts that she is "eligible for a waiver of the job offer and labor certification requirement."

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions or legal citation to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. *See Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991).

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1990, 1991). Rather, the "additional legal arguments" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached in its decision that could not have been addressed by the party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Id.* Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

In re New York State Dept of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that she seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that she will serve the national

interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

In the April 7, 2014, decision dismissing the petitioner's appeal, we upheld the director's determination that the petitioner had failed to establish eligibility for the national interest waiver. The petitioner's evidence was not sufficient to demonstrate that she meets the second and third requirements specified in *NYSDOT*. Specifically, the petitioner had not shown that the benefits of her work as a teacher would be national in scope and that she would benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

On motion, the petitioner states that the nature of her employment and H1-B nonimmigrant visa status have "limited the scope of [her] performance." The petitioner asserts that the school district controlled her output and prevented her from implementing programs that "could have helped the system more." Regardless of the circumstances of the petitioner's employment and her assertion that her nonimmigrant visa and employment situation have limited the scope of her influence on the educational system, the petitioner must still demonstrate that she will serve the national interest to a substantially greater degree than do others in the same field. *NYSDOT* at 218, n.5. Eligibility for the waiver rests on the petitioner's individual qualifications and the prospective national benefits of her work, rather than on the circumstances that she asserts prevent her from compiling and disseminating her work beyond The petitioner has not shown that her efforts have had more than a local impact, or that U.S. school systems have successfully implemented her teaching methodologies.

The petitioner quotes *NYSDOT* at 217, n.3 regarding the limited scope of elementary school teachers, and asserts that the quoted passage represents "a pre judgment as to whether an Instructional Teacher will be able to qualify for the waiver. . . . If this is the case no single school teacher may qualify for the waiver." Nonetheless, while the petitioner expresses her disagreement with the quoted passage, she acknowledges *NYSDOT*'s finding that the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement. *Id.* In addition, the petitioner asserts that, as much as "teachers would want to get to multiple schools so as to widen their service area, the nature of the job will not permit it. . . . It has to be taken into consideration that, teachers are limited by the system they are into [sic]." With regard to following the guidelines set forth in *NYSDOT*, by law, USCIS does not have the discretion to ignore binding precedent. *See* 8 C.F.R. § 103.3(c). The petitioner does not point to any evidence in the record showing that her specific work has produced national benefits in the field of education.

The petitioner asserts that elementary education forms the foundation for subsequent higher levels of education. By the plain language of section 203(b)(2)(A) of the Act, a foreign worker is generally subject to the job offer requirement (including labor certification) even if that worker's employment "will substantially benefit prospectively the . . . educational interests . . . of the United States." Employment in a beneficial occupation alone, therefore, does not qualify the petitioner for the national interest waiver.

Likewise, exceptional ability, defined at 8 C.F.R. § 204.5(k)(2) as "a degree of expertise significantly above that ordinarily encountered" in a given field, is not automatically grounds for granting the waiver. Therefore, an elementary school teacher with a degree of expertise significantly above that ordinarily encountered in the field of elementary education would not, as a result, necessarily qualify for the waiver. These provisions are found in the statute, and USCIS has no discretion to disregard or overrule them. Exceptional ability that will substantially benefit the United States is not sufficient grounds for approving the national interest waiver.

The petitioner asserts that the United States will benefit from "[g]iving, Instructional Teachers a fair chance to obtain lawful permanent residence." The national interest waiver is not a standard avenue for immigration. It is, rather, a special exemption from the normal requirement of obtaining a labor certification.

The petitioner states: "In my case, prior to coming here in the U.S., I was equipped with education, training and experience which I applied to the underserved, low performing school of [redacted] elementary school, and because of my dedication the progress of my students were [sic] reflected in the FCAT [Florida Comprehensive Assessment Test] results." Any objective qualifications which are necessary for the performance of the occupation, however, can be articulated in an application for labor certification. *NYSDOT* at 220-221. Furthermore, while the submitted test results show that the petitioner was an effective teacher at [redacted] there is no documentary evidence showing that her work has affected the field of education as a whole. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

The petitioner asserts that "new graduates from this country come and go, some lasts [sic] only for a month or two, because they are in constant chase of better place of work," but she does not provide any academic studies or employment statistics to support the claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Assoc. Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Regardless, the unavailability of qualified U.S. workers or the amelioration of local labor shortages are not considerations in national interest waiver determinations because the labor certification process is already in place to address such shortages. *NYSDOT* at 218. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the U.S. Department of Labor through the labor certification process. *Id.* at 221. In addition, the petitioner asserts that "the labor certification process will delay delivery of [her] services to [her] students as well as the continuity of the system [she] had implemented," but the timing of the filing (such as the imminent expiration of her nonimmigrant status) does not determine eligibility for the waiver. The national interest waiver is not just a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.* at 223.

The petitioner states that she helped her students to perform better academically and that motivating them to "aspire for college and become professionals" is "the most important outcome of elementary teaching." While the petitioner comments on her effectiveness as a teacher, she does not indicate

how her impact or influence as an educator is national in scope. In addition, there is no documentary evidence showing that the petitioner's work has influenced the elementary education field.

The petitioner's asserts that her school administrator at assigned her "to conduct a seminar attended by 36 other teachers in 2011." The August 18, 2011, "Technology Inservice Training" workshop offered by the petitioner at provided instruction on the use of systems. The record does not show, and the petitioner does not state, however, that she developed any of these classroom technologies. Although the petitioner trained her colleagues at in the use of the technologies, there is no evidence showing that the petitioner has played a role outside her school with respect to the devices.

The petitioner asserts that her "case is far different from" *NYSDOT* because that precedent decision concerned an engineer rather than a teacher. The core findings in *NYSDOT* were deliberately broad, however, and the three-pronged national interest analytical framework is not limited to engineers.

In the brief, the petitioner references unpublished decisions for individuals whose national interest waiver petitions were approved. Although precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. *See* 8 C.F.R. § 103.3(c). The petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. Without such evidence, the assertion that the cases merit the same outcome is unwarranted.

The petitioner asserts that her case involves "intangible wealth" and the "mind[s] of young people" and that she should be "given more time" to convince the service that she is eligible for the waiver. Eligibility, however, must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The petitioner mentions her work at and how she was successful in teaching her students mathematics. The petitioner asserts that the recent improvement in student performance at proves her superiority to local U.S. workers. She states: "Should there be an U.S. worker of with [sic] the same qualifications as I have . . . and can generate the same result as I did in the first place, I believe this school would not have remained at the bottom when it comes to students [sic] performance." Although the record shows that an overall improvement coincided with the petitioner's time at the school, the submitted evidence does not establish that the petitioner was largely or solely responsible for that improvement.

The petitioner further states: "[A]fter 5 years of teaching in this school, I was able to fully understand the background of my pupils, knowing where they are coming from is very important in designing classroom instruction which will answer the needs of the recipient." The petitioner has not shown, however, that understanding her students' backgrounds and designing classroom instruction to meet their needs are characteristics that differentiate her from similarly qualified elementary school teachers. Regardless, there is no evidence demonstrating that the petitioner's work has had, or will continue to have, an impact beyond her school.

The petitioner asserts that raising the level of student performance should be a determining factor for the waiver. The national importance of "education" as a concept, or elementary school educators as a class, does not establish that the work of one teacher produces benefits that are national in scope. *NYSDOT* at 217, n.3. A local-scale contribution to an overall national effort to improve student performance does not meet the *NYSDOT* threshold. There are no blanket waivers for experienced foreign school teachers. USCIS grants national interest waivers on a case-by-case basis, rather than establishing blanket waivers for entire fields of specialization. *Id.* at 217.

The petitioner correctly mentions that the standard of proof in this matter should be a preponderance of the evidence. In most administrative immigration proceedings, the petitioner must prove by a preponderance of the evidence that he or she is eligible for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). The truth is to be determined not by the quantity of evidence alone but by its quality. *Id. at* 376. In the present matter, the submitted documentation does not demonstrate by a preponderance of the evidence that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The petitioner's motion includes 2014 Grade 4 reading and mathematics test results for her students at her current employer. New evidence is relevant to a motion to reopen, but the petitioner's Form I-290B, Notice of Appeal or Motion, and supporting brief do not indicate that she has filed a motion to reopen. *See* 8 C.F.R. § 103.5(a)(2). Even if we considered the petitioner's filing as a motion to reopen, the 2014 test results postdate the filing of the petition on June 29, 2012. Again, eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Accordingly, the submitted test results from 2014 cannot be considered as evidence to establish the petitioner's eligibility at the time of filing. Regardless, the submitted test results do not show that the petitioner's work has influenced the field of education as a whole rather than just her own classroom and school.

In conclusion, the petitioner has not established that our appellate decision was based on an incorrect application of law or USCIS policy. The petitioner has not shown that the work she was engaged in or had completed at the time of filing had benefits that were national in scope. In addition, the petitioner has not demonstrated that her work had already influenced the field as a whole at the time of filing or even as of the date she filed the current motion. Accordingly, the petitioner's motion does not overcome the grounds underlying our previous findings.

The regulation at 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reconsidered, and the previous decision will not be disturbed.

ORDER: The motion to reconsider is dismissed, our April 7, 2014 decision is affirmed, and the petition remains denied.